BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUBEN GARCIA	)	
Claimant	)	
VS.	)	
	)	
GOLDEN WHEAT RANCH, L.L.C.	)	Docket No. 262,975
Respondent	)	
AND	)	
	)	
CGU HAWKEYE SECURITY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the Award dated May 21, 2003 entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Appeals Board (Board) heard oral argument on November 21, 2003.

APPEARANCES

Kevin T. Stamper of Wichita, Kansas, appeared for the claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the May 21, 2003 Award.

ISSUES

The ALJ ruled claimant's heart attack on November 11, 2000 was not precipitated by his employment with respondent. Accordingly, recovery was prohibited by K.S.A. 44-501(e), commonly referred to as the “heart amendment.” The ALJ further found that the weather conditions were not substantial in nature nor a substantial causative factor in causing the heart attack. Accordingly, claimant's heart attack was not the result of an "external" force of cold, windy weather.

Claimant appealed the ALJ's decision arguing first, that the heart attack was causally connected or related to the work he was doing on the date of his heart attack and that shoveling snow was unusual and required more exertion than his regular job duties. Second, claimant argues the cold, windy and snowy conditions constituted an external force sufficient to remove this case from the heart amendment.

Respondent contends the ALJ appropriately denied the claim by finding the job claimant performed on November 11, 2000 neither led to his heart attack nor required more exertion than his regular job duties. In addition, respondent disputes that the weather conditions on that date were as severe as represented by claimant and denies they were a substantial causative factor in claimant's heart attack. Thus, the respondent argues the ALJ's decision should be affirmed.

The issues for decision by the Board are did the claimant's heart attack arise out of his employment and is this claim barred by the heart amendment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. The Board approves those findings and conclusions and adopts them as its own.

Compensability in this case is governed by K.S.A. 44-501(e) which provides as follows:

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment. (Hereinafter referred to as the "heart amendment.")

This statutory provision requires two separate elements to be shown. The claimant must establish that his heart attack was causally connected or related to his work activities on November 11, 2000 ***and*** his physical exertion on that date was more than was usually required of him in the course of his job. The purpose of this legislation "was to limit compensability for heart and stroke cases and reverse a long line of Supreme Court decisions in which compensation was awarded even though preexisting heart or vascular

conditions may have been a predisposing factor." [1] "Where there is no causal connection between the worker's exertion and his injury, the question of whether the exertion was unusual within the meaning of the "heart amendment" is irrelevant." [2]

Even accepting as true the uncontradicted testimony of Dr. Pedro Murati that the claimant's heart attack was caused by his work, there must also be a showing that the work he was performing was greater than that which he was accustomed to performing in his regular job. Our Supreme Court has indicated that the standard for deciding what is unusual exertion for purposes of the heart amendment is the work history of the individual involved. [3] The "unusualness" may be a matter of degree and may appear in the duration, strenuousness, distance or other circumstances involved in the work. [4] Whether work is construed as "usual" or "regular" generally depends upon a number of facts and circumstances. [5]

In *Nichols*, the claimant normally performed road maintenance work, including mowing, truck driving, flagging, snow and ice removal, repairing guardrails, installing snow fences and filling highway cracks. From May to frost of each year, he normally mowed, spending the balance of the year doing whatever was required. Claimant became ill when he was walking the highway filling in cracks with liquid tar and later died. The *Nichols* Court addressed the heart amendment and identified a number of factors to be considered in deciding the unusualness of an employee's work exertion. These factors include the daily activities of the claimant, the nature of his employment, the employee's classification the variety of tasks performed along with the seasonal character of the work. [6] In *Nichols*, it was ultimately determined that the claimant's work was not more than what he usually performed and as such, his claim was barred by the heart amendment. [7]

In this instance, claimant's job was that of a farm hand and working supervisor while at the ranch and a handyman doing general labor, including yard work and home maintenance when in town. The ALJ found:

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[1] *Mudd v. Neosho Memorial Regional Medical Center*, 275 Kan. 187, 62 P.3d 236; *See also Dial v. C.V. Dome Co.,* 213 Kan. 262, 266 and 267, 515 P.2d 1046 (1973); *Nichols v. State Highway Commission*, 211 Kan. 919, 923, 508 P.2d 856 (1973).

[2] *Chapman v. Wilkenson Co.,* 222 Kan. 722, 727, 567 P.3d 888 (1977).

[3] *Mudd* at 192; *Chapman* at 728.

[4] *Chapman* at 728; 1A A. *Larson's Workers' Compensation Law* § 38.64(a) (1973).

[5] *Nichols* at 919.

[6] *Id.* at 925 and 926.

[7] *Id.* at 925.

The Claimant testified that he began working for the Respondent in 1972 doing normal work. He stated that sometimes he drove a tractor, did some maintenance type work and supervised others at times. That his normal job activities did not require him to perform heavy manual labor jobs. Normally, he did a lot of driving, did some cleaning and checked on things. He testified that on November 11, 2000, he was shoveling snow for the Respondent, which was not normal. The shoveling was harder work than he normally performed. He was clearing a driveway at the home of John Golden. The driveway was about 60 by 40 feet and the snow was 6 to 7 inches deep. The Claimant stated that the snow was wet and real heavy. He began shoveling around 10:30 or 11:00. It was cold and windy. He said he began feeling like he was running out of breath and his chest began hurting. As he continued to shovel, the feelings became worse and eventually it was so bad that he went home and told his wife. He laid down for about 15 minutes, hoping the feelings would go away, but it did not get better. He had his son get him some aspirin. The feelings kept getting worse so he had his wife call the hospital. He was told to come in right away. He was treated in the emergency room and was eventually informed that he had a heart attack. [8]

. . . .

On cross examination, the Claimant testified that he was 25 or 26 years old when he began working for the Respondent. He was initially hired to care for the Respondent's yard. As time went on his job duties changed. That when his heart attack occurred, his job duties included being a maintenance person/caretaker of the home and the farming operation. This included mo[w]ing the yard and weed eating. He stated it was not his normal job to shovel snow but it was not the first time he had done it. That it was one of his jobs to remove the snow from the driveway or other properties of the Respondent when it snowed. That he shoveled snow on more than on[e] occasion each winter for the past 4 or 5 winters. That the only snow moving equipment that the Respondent owns is a shovel. On November 11, 2000, the Claimant believed the snow to be 6 inches deep on the driveway even though the National Climatic Data Center indicated that the snow fall was only 2.6 inches. [9]

. . . .

John Golden, owner of the Respondent corporation, testified that he hired the Claimant sometime in the early '70's. The Claimant was initially hired to perform yard work and to help at the ranch. The Claimant was not a full time employee. He would perform similar work for others. The Claimant eventually acquired trucks and hauled for others and later acquired an ensilage cutter and performed harvest work. Mr. Golden testified that when the Claimant was working on the ranch, he or his foreman instructed the Claimant as to what needed done. That in town, Mrs.

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[8] Award at 3.

[9] *Id.* at 3.

Golden instructed him. On the ranch, the Claimant would dress up the cattle lots and area around where feed was stored. This would be done with what ever tools the Claimant had. Mr. Golden stated that in his opinion, this was fairly strenuous work. [10]

. . . .

Marcia Golden, wife of John Golden testified that when the Claimant was initially hired, he was to assist her in maintaining their home in town. That he assisted in landscaping, mowing and whatever needed to be done. That when he began, their property had not been completely landscaped. That the Claimant dug holes by hand for large trees that he then rolled into the holes. He also took care of the lawn around the four-plex that they owned. She stated that snow removal was one of his jobs also, from day one. Mrs. Golden stated that when it snowed, the Claimant knew he was to come over, and the sooner the better because she is one that likes to get things done. She stated that when he acquired additional equipment, she hired others to mow her lawn, the apartments and the four-plex. That the Claimant was available in the spring, so he would power rake and clean up all the lawns, getting them ready for who ever would mow. He would also get all of her gardens hoed and the ground turned over and ready for her to plant. She testified that in June or July of the year 2000, the Claimant dug out by hand, 40 year old trees that were taller than the apartment complex. He also dug out the roots and did this for 10 hours a day for over a week. The Claimant also carried 33 [sic] gallon cans (30 three-gallon cans) of water to trees, when it was dry. The winters remained about the same because he was around. That when it quit snowing, if he did not show up, she would hire someone else. When he was there, he shoveled all of the four-plex walks as well as hers at her home. Mrs. Golden testified that when she did her deep cleaning, the Claimant moved all the couches, the piano and everything else, so she could clean behind them.

Mrs. Golden testified that it had began [sic] snowing the Friday night prior the Claimant's accident on Saturday. That she knew on Saturday, the snow needed to be removed and that Ruben did not show up, so she called someone named Brian, about 10:30 to come shovel snow. That about 30 or 45 minutes later, she heard someone shoveling. She looked out and it was the Claimant. That a little later, the Claimant came in and they visited. She stated that she jumped on him stating that she did not know he was in town and had called someone else to do the shoveling. She said the Claimant went back outside and shortly after that he left. She assumed he had gone for lunch and when he had not come back by mid afternoon, she believed she had angered him, so she again called Brian and they finished the shoveling. Mrs. Golden disagreed that the snow was abnormally wet, heavy and drifted. Also, that within the prior 2 or 3 winters, the Claimant would have shoveled

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[10] *Id.* at 3 and 4.

> snow in similar or worse conditions. The Claimant had shoveled about 1/3 of the area which is about 2 cars wide and 2 cars long. [11]

In denying compensation, the ALJ obviously found the testimony of John and Marcia Golden to be more credible than that of claimant. The Board agrees. Claimant exaggerated the severity of the weather conditions on the date of his heart attack, as well as the depth and weight of the snow. He likewise appeared to have exaggerated the length of time he spent shoveling snow. It follows that if he exaggerated the level of physical exertion that immediately preceded his heart attack, then it is likely that he understated the amount of physical activity his job usually required. Based upon the testimony of Mr. and Mrs. Golden, which the Board finds is the more credible, the Board is not persuaded that the job claimant was performing on November 11, 2000 was significantly different than his regular job duties. Shoveling snow was unusual only in the sense that a snowfall sufficient to require removal was unusual. It was not unusual for claimant to shovel snow when those conditions existed. Moreover, claimant's job involved a significant amount of physical labor. Claimant's level of exertion shoveling snow on November 11, 2000 was not unusual.

Independent of the finding above, the Board also finds that the record fails to establish the cold weather was a substantial causative factor in the claimant's heart attack. The Kansas Supreme Court has ruled that when unusual exertion is not established, a heart attack could be compensable by instead showing an "external force" was the precipitating cause of the disability. [12] Whether an external force or agency produced a worker's disability is a question of fact. [13] The required elements for "external force" are as follows:

> To support a finding that claimant's cardiac or vascular injury is the product of some extreme external force, [1] the presence of a substantial external force in the working environment must be established and [2] there must be expert medical testimony that the external force was a substantial causative factor in producing the injury and resulting disability. [14]

In this case no physician testified that the cold weather was a contributing factor, much less a substantial causative factor of the myocardial infarction. For this reason, the Board finds there is an absence of proof necessary to establish that weather constituted an "external force" which caused the claimant's heart attack.

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[11] *Id.* at 4.

[12] *See Dial v. C.V. Dome Co.*, 213 Kan. 262, 266, 515 P.2d 1046 (1973).

[13] *Suhm v. Volks Homes, Inc.*, 219 Kan. 800 Syl. 4, 549 P.2d 944 (1976).

[14] *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 484 and 485, 565 P.2d 254 (1977).

There is one last issue to address. Claimant seeks payment of "all outstanding medical bills and mileage that **should have been** addressed pursuant to this Board's preliminary order. . . ." [15] On June 19, 2001, following a preliminary hearing, Judge Fuller issued an Order Denying Compensation. That preliminary order was appealed to the Board and on October 30, 2001, one member of the Board issued an Order reversing the ALJ and remanding the matter to the ALJ "for findings on the issue of claimant's request for payment of past medical expenses as authorized, medical mileage, future medical treatment and temporary total disability compensation." [16] Thereafter, on November 5, 2001, the ALJ issued an Order for Compensation that provided:

> That temporary total disability compensation is hereby granted and ordered paid by Respondent and Insurance Carrier commencing from 11/11/00 until 12/07/00;
>
> That medical mileage, medical bills and medical treatment is ordered to be paid by the Respondent and Insurance Carrier on Claimant's behalf that relates to the 11/11/00 accident. [17]

The administrative file also contains two separate penalty motions, but no order for penalties. Instead, the case proceeded to a regular hearing and final award. Once a case goes to final award and is found non-compensable, the ALJ and Board are without jurisdiction to award preliminary benefits or order the payment of preliminary benefits previously awarded.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated May 21, 2003 is hereby affirmed.

IT IS SO ORDERED.

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[15] Brief of Claimant/Appellant to the Board at 5 (filed June 30, 2003).

[16] *Garcia v. Golden Wheat Ranch, L.L.C.*, No. 262,975, 2001 WL 1399473 (Oct. 30, 2001).

[17] Order for Compensation (Nov. 5, 2001).

Dated this ____ day of December 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and CGU Hawkeye Security
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director